

The parties requested the opportunity to provide post-hearing briefs, the last of which was timely received in the Hearings Bureau on November 6, 2009. Based on the evidence adduced at hearing and the parties' arguments in their post-hearing briefs, the following findings of fact, conclusions of law and recommended decision are made.

II. ISSUE

The only issue in this case is whether the VSO II positions and the Budget Analyst position should be excluded from the proposed unit because they are supervisory employees within the meaning of Mont. Code Ann. § 39-31-103(11)(a).

III. FINDINGS OF FACT

1. MVA provides assistance through its statewide offices to veterans who need help in obtaining various federal and state veterans benefits. The present administrator is Joe Foster. The positions in question in the present case are the positions of Veterans Service Officer II (VSO II) and the Budget Analyst for the MVA.

2. MVA is divided up into four statewide regions (Regions 1 through 4). Exhibit A. Each region has two offices. *Id.* Each of the offices provides services in the town in which it is located as well as other towns located within the region. The services provided in other towns (the outreach services) are completed by sending personnel in the offices to other towns within the regions on a periodic basis.

3. Region 1 has offices at Fort Harrison in Helena and in Belgrade. Each of these offices has one full time VSO II and one full time Veterans Service Officer I (VSO I). Region 2 has an office in Missoula and in Kalispell. Each of these offices has one full time VSO II and one full time VSO I. Region 3 has an office in Great Falls and in Havre. Each of these offices has one full time VSO II and one full time VSO I. Region 4 has an office in Billings and in Miles City. The Billings office has a VSO II and a VSO I. The Miles City office is staffed by a sole VSO II. That office has no other staff and the incumbent in that position, Michael Cohan, has no supervisory duties at this time.

4. In 2003, MVA developed a job description for the VSO II position which identifies the duties that the VSO II undertakes. Notably, three factors distinguish the VSO II position from the VSO I position description. First, the position serves as Service Office Manager, "including responsibility for developing and/or implementing service plans, education and outreach efforts, and office operations; recommending policy initiatives or modifications; and coordinating with other

regional offices” In addition, the position “monitors compliance with established operational policies and procedures and achievement goals” and also “monitors compliance with established policies reviews and approves atypical methods and procedures.” Finally, the position involves 10% lead worker supervision (See FOF 13), which includes providing “input to the designated Regional Service Officer on position descriptions and performance standards, recommending, implementing, and monitoring corrective action on staff performance, and participating in recruitment and selection by assisting the designated Regional Service Officer in screening applicants, establishing questions for the structured interview, participating in interviews, and recommending hiring.”

5. Jim Kerins developed the position descriptions for the VSO II position and the Budget Analyst position. The position description for each position was developed with substantial input from the incumbents occupying the position in order to ascertain the true extent of the various duties each position carried out.

6. Exhibits G, H, I, J, and K demonstrate that the VSO II's have the ability to discipline their subordinate VSO I's. For example, in Exhibit G, a letter of discipline from VSO II Brenda Briggs to a VSO I, Briggs stated unequivocally that she would take disciplinary action against the offending VSO I if she felt that the veterans they were serving were not getting 100% from the VSO I. In Exhibit I, VSO II Hernandez reprimanded a VSO I for making arrangements to attend training before securing permission from Hernandez to attend. In addition, Hernandez countermanded the VSO I's efforts to set travel for the training.

7. David Capps is presently a VSO I at the Great Falls office. He has earned a promotion to the VSO II position which he will undertake shortly. As a VSO II, he will train and have supervisory responsibility over the VSO I position in the office as did his predecessor when Capps filled the VSO I position. This will include making schedules, approving time cards, scheduling vacations, and monitoring the work of the VSO I. As a VSO II, Capps will earn an additional 5% in salary that all VSO II's earn over their VSO I subordinates.

8. Diana LaBuda was hired to be the VSO II in the Havre office. She has one VSO I working under her. She is required to and in fact does conduct regular performance reviews of the VSO I. The performance review involves assigning a score ranging from 1 to 5 in reviewing all facets of the VSO I's work.

9. LaBuda is responsible for scheduling time off for the VSO I. Although there has never been a conflict between her and the VSO I with regard to time off, LaBuda has the power to determine who gets what time off. There has never been a need to discipline the VSO I. However, LaBuda certainly has the power to implement and suggest corrective action should the need ever arise.

10. Consistent with her job description, LaBuda participated in the hiring of the incumbent who holds the VSO I position under her. She, along with the Regional Supervisor and the Administrator, conducted interviews of the candidates for the VSO I position. She had direct input into the hiring of the various candidates. Although the person hired for the position was not her first choice, it is clear that the hiring decision was a collaborative effort between LaBuda, the Regional Supervisor, and the Administrator.

11. Michael Cohan holds the VSO II position in the Miles City office. He is the sole employee in the office. Accordingly, while he has supervisory authority as designated in the VSO II position description, he does not in practice exercise that authority because there are no other employees in the Miles City office to supervise.

12. Cohan's job requires travel to the various towns within the Miles City office's district on a regular and recurring basis in order to do outreach to the veterans living in those towns. He sets his own schedule and is free to set the dates during which he travels to the towns he services. He is permitted to stay in a remote location as long as necessary to complete his contacts with the veterans seeking help in that locale.

13. In 2006 or 2007, MVA created the Budget Analyst position. In 2007, a position description for this job was created. Exhibit C. The Budget Analyst position's primary focus is financial management of the federal and federal/state operating budgets that MVA relies on to fund its programs. The position is also responsible for supervising one FTE technical position (the Benefit and Administrative Support Technician). According to the job description, 5% of the work load of the position involves supervision over the Support Technician. This supervision includes establishing and revising overall work plans, priorities and procedures, participating in interviews, and recommending selection criteria for hiring candidates for the technical support position. In addition, the Budget Analyst is responsible for conducting performance evaluations on the technical support FTE.

14. Lee Ann Hall, a 20 year employee of the MVA, was hired for the Budget Analyst position at its inception. She has one Support Technician who works for her. Hall was part of the hiring panel that hired the incumbent in the Support Technician position that Hall supervises. She had direct, independent input into the hiring of the incumbent. The hiring decision was a collaborative effort between her and the Administrator who also sat on the hiring panel.

15. Hall has sole responsibility for conducting performance appraisals for the Support Technician whom she supervises. She has conducted all three performance appraisals of the Support Technician. Completing the performance appraisal

requires Hall's independent assessment of the Support Technician's work during the period in review. Hall assigns a grade between 1 and 5 to describe the quality of the various facets of the Support Technician's work that are being reviewed. Hall's performance appraisals become part of the Support Technician's personnel file.

16. Hall has the power to discipline the Support Technician, although she has never had to impose discipline upon the incumbent in the position. She also has authority to schedule time off and vacations for the Support Technician that she supervises.

IV. DISCUSSION²

The parties agree that the sole issue in this case is whether the VSO II's and the Budget Analyst position are properly excluded from the bargaining unit because they have supervisory powers. The employer contends that it has demonstrated that the VSO II's and the Budget Analyst positions should be excluded from the unit because these positions are supervisory. The union contends that the employer has failed to prove that the positions are supervisory and, therefore, the positions are properly within the bargaining unit.

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, because the statute excludes supervisory employees from the definition of "public employee," a supervisory employee does not have the rights guaranteed by Montana Code Annotated § 39-31-201 and cannot be included in a unit for collective bargaining purposes. Mont. Code Ann. § 39-31-103(9)(iii).

Montana Code Annotated § 39-31-103(11)(a) defines a supervisory employee as "an individual having authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment." The term "authority" is defined as "the *power* to influence or command thought, opinion or behavior." Webster's Ninth New Collegiate Dictionary (1988) (emphasis added). In addition, Montana Code Annotated § 39-31-103(11)(b) provides that

²Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

the authority articulated in subsection 11(a) “is the only criteria that may be used to determine if an employee is a supervisory employee.”

The party asserting that an employee should be excluded from a unit has the burden of proving supervisory status. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991). Not all, or even a large number, of the statutory indicia of supervisory status are necessary to establish that an employee is a supervisor. The statutory definition is in the disjunctive, and it is therefore sufficient for supervisory status to be established based on only one of the statutory criteria. *E and L Transport Co. v. NLRB*, 85 F.3d 1258, 1269 (7th Cir. 1996).

Applying the criteria set out in Montana Code Annotated § 39-31-103(11)(a), the evidence demonstrates preponderantly that both the VSO II and the Budget Analyst positions are supervisory positions. It is patently obvious that the VSO II is responsible for supervising the VSO I which includes disciplining and rating the performance of the VSO I. This authority is exercised utilizing independent judgment as Exhibits G, H, I, J, and K show. This independent supervisory authority is also amply demonstrated by the testimony of Capps, and to a lesser but nonetheless corroborative extent by LaBuda's testimony.

The union relies heavily on Cohan's testimony to show that the VSO II position is supervisory only on paper. Cohan's situation, however, is clearly not a function of the position's lack of supervisory authority. Rather, it is an economic exigency of the particular post to which Cohan is assigned. It is clear if other employees are added to the Miles City office, Cohan (or whoever holds the VSO II position) will have regular recurring authority to discipline, schedule, and conduct performance reviews. It is also clear from the other VSO II positions that the position has supervisory authority at all times to discipline, hire, and complete performance reviews of subordinates in the office. The VSO II position is supervisory exempt under the Montana Public Employees Collective Bargaining Act and must be excluded from the bargaining unit.

Likewise, the Budget Analyst position is plainly supervisory. Since its inception, the position has had unfettered supervisory authority over the full time technician. This includes the ability to discipline, schedule, and complete performance reviews. The Budget Analyst has regularly performed these supervisory functions over the technician position and no one but the Budget Analyst has ever performed these supervisory functions over the technician position. This authority is present at all times and the authority is exercised with independent judgment. The Budget Analyst position, therefore, must also be excluded from the bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Mont. Code Ann. § 39-31-207.

2. The VSO II and the position of the Administrative Budget Analyst are supervisory positions as contemplated by the language in Mont. Code Ann. § 39-31-103(11) and are therefore properly excluded from the bargaining unit.

VI. RECOMMENDED ORDER

An election by secret ballot shall be conducted as soon as possible, in accordance with the rules and regulations of the Board of Personnel Appeals, among the employees in the bargaining unit. The bargaining unit shall consist of VSO I's contained in MVA position numbers 67100397, 67100398, 67100400, 67100401, 67100402, 67100403, and 67100408 and the administrative assistant in position number 67100404. The VSO II positions and the position of the Budget Analyst shall be excluded from the bargaining unit as they are supervisors.

DATED this 21st day of December, 2009.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 13, 2010. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518